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<u>ATTORNEYS FOR APPELLANT</u>: <u>ATTORNEYS FOR APPELLEE</u>:

SUSAN K. CARPENTER STEVE CARTER

Public Defender of Indiana Attorney General of Indiana

ANNE MURRAY BURGESS KELLY A. MIKLOS

Deputy Public Defender Deputy Attorney General Indianapolis, Indiana Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

ISAIAS CADENA,)
Appellant-Petitioner,)
vs.) No. 20A05-0510-PC-579
STATE OF INDIANA,)
Appellee-Respondent.)

APPEAL FROM THE ELKHART SUPERIOR COURT The Honorable George Biddlecome, Judge

Cause No. 20D03-0107-CF-81

October 2, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Isaias Cadena appeals the denial of his petition for post-conviction relief (PCR), by which he challenged his convictions for child molesting, a class A felony, sexual misconduct with a minor, a class B felony, and battery resulting in bodily injury, a class A misdemeanor. Cadena presents the following restated issue for review: Did he receive ineffective assistance of counsel at trial?

We reverse.

The facts most favorable to the convictions reveal that during the summer of 1999, thirteen-year-old B.B. moved from Oregon to Indiana to live with her older sister, Crystal, Crystal's boyfriend/future husband,¹ Cadena, and their infant son. Soon thereafter, while alone with B.B., Cadena cuddled with B.B. in his bed while they watched television. He eventually asked if he could touch her "private area," and B.B. told him no. *Trial Transcript* at 229. Cadena, however, put his hand down her pants and proceeded to touch B.B.'s vaginal area and then penetrated her vagina with his fingers. She told him to stop, and he did.

B.B. reported that no other sexual contact occurred until January 2001, when she was fifteen years old. On January 15, B.B. was off school for a holiday and was home alone with Cadena. That day, Cadena initiated inappropriate sexual conversations with B.B. and repeatedly asked if he could check to see if she was a virgin. He eventually penetrated her vagina with his finger. On a subsequent day, after unsuccessfully seeking permission, Cadena performed oral sex on B.B. When B.B. got up and told him to stop,

¹ Crystal and Cadena married in June 2000.

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Cadena told her to lie back down or he would force her to submit to intercourse. Cadena then forced B.B. to masturbate him.

Thereafter, on or about January 20, Cadena sought to discipline B.B. because she was doing poorly in school. Crystal had specifically asked him to intervene, and they had previously discussed with B.B. the possibility of her being sent to military school.² After other disciplinary measures failed that day, Cadena proceeded to "spank" B.B. He initially used his hand, then a board that broke, and then a larger board, which he dubbed "Toothpick." B.B. experienced severe bruising all over her buttocks as a result.

The following day, Cadena had left town for work and B.B. was with Crystal watching a television program about sexual abuse. At some point during the program B.B. asked Crystal "if it was true if she should always tell, even though it would break someone apart". *Id.* at 200. Crystal responded that other people did not matter and "[i]f something bad's happening to you, you need to tell somebody." *Id.* B.B. began crying and proceeded to tell Crystal of Cadena's actions.

Upon his return, Cadena spoke with police. He admitted striking Crystal multiple times with a board named Toothpick. The specific details he provided regarding the events surrounding this incident were virtually the same as in B.B.'s account. Cadena, however, repeatedly denied ever having any sexual contact with B.B.

On July 16, 2001, the State charged Cadena with child molesting, a class A felony, sexual misconduct with a minor, a class B felony, and battery resulting in bodily injury, a

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² In fact, one or two weeks before, Cadena had shown B.B. an application for military school with her name on it. B.B. did not want to go.

class A misdemeanor. At the jury trial, which commenced on March 18, 2002, Crystal, B.B., and the detective who spoke with Cadena were the only witnesses. The jury found Cadena guilty as charged, and the trial court subsequently sentenced Cadena to an aggregate term of fifty-six years in prison.³ This court affirmed his convictions on direct appeal. *Cadena v. State*, No. 20A03-0206-CR-176 (February 4, 2003), *trans. denied*.

On April 15, 2004, Cadena filed his pro se PCR petition, which was amended by counsel on January 26, 2005. A hearing on the amended petition was held on March 24, 2005. At the hearing, Cadena argued that he received ineffective assistance of trial counsel because counsel failed to object to evidence and argument regarding the history of his relationship with Crystal, which will be addressed more fully below. Trial counsel testified at the PCR hearing and explained that the theory of the defense at trial was that B.B. had fabricated the charges in retaliation for the corporal punishment Cadena had inflicted upon her the previous day and possibly also because of recent threats to send her to military school. Counsel further testified that he believed evidence regarding the history of Cadena's relationship with Crystal was irrelevant and prejudicial. After the hearing, on August 15, 2005, the PCR court denied Cadena's petition. Cadena now appeals, arguing that he received ineffective assistance of trial counsel.

In order to prevail on his claim of ineffective assistance of counsel, Cadena must demonstrate both that his counsel's performance was deficient and that he was prejudiced thereby. *French v. State*, 778 N.E.2d 816 (Ind. 2002). Counsel's performance is

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³ Cadena received forty years for child molesting, fifteen years for sexual misconduct with a minor, and one year for battery, all to be served consecutively.

deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* To establish the requisite prejudice, Cadena must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002).

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. When a claim for ineffective assistance of counsel is based on counsel's failure to object, the defendant also must show that a proper objection would have been sustained.

Id.

Cadena argues that counsel rendered ineffective assistance by failing to object to improper evidence and argument regarding the history of his relationship with Crystal. While counsel did object on a couple of occasions and said objections were sustained, a great deal of testimony regarding his relationship with Crystal was presented at trial with no objection from defense counsel. In fact, the bulk of Crystal's testimony concerned this subject. The State elicited the following information from Crystal, its first witness: she met Cadena in Oregon when she was about ten years old; she and her family lived next-door to Cadena and his then-wife, Elizabeth; Cadena and Elizabeth offered support to Crystal to help her cope with her mother's alcoholism; Cadena, in particular, made

Crystal feel comfortable at his home, made her feel loved, and gave her much-needed attention; at the age of fourteen, Crystal moved in with Cadena and Elizabeth as their foster child; at the age of fifteen, she moved into a group home⁴ until she graduated from high school, when she moved back in with Cadena and Elizabeth;⁵ soon thereafter, a romantic relationship developed between Crystal and Cadena; he left his wife and moved to Texas with the eighteen-year-old Crystal; they moved to Indiana in 1998 when Crystal was pregnant with their first child; she gave birth to their first child in September 1998 at the age of nineteen; and she married Cadena in 2000 when she was pregnant with their second child. With respect to the development of their romantic relationship, the State elicited the following testimony:

- Q And that was also during the period of time that you thought that he was your father figure?
- A Yes.
- Q What occurred?
- A Touching. I just felt I didn't want him to stop loving me the way he did, and when he--when I felt like he wanted sexual intercourse, I told him it would be okay.
- Q You felt that if you said no, he would stop loving you?
- A Yes
- Q And you had sexual intercourse with him?

[Defense Counsel] Objection.

Id. at 188-89. At that point, counsel lodged his first objection to this line of questioning, arguing that it was irrelevant, prejudicial, and only intended to make Cadena look bad. The State responded:

⁴ Crystal and B.B.'s mother died in 1996, while Crystal was living in the group home.

⁵ Crystal testified that she saw Cadena as her father and that he made her "feel wanted" and treated her "special." *Trial Transcript* at 188.

Judge, I believe it goes to the issue of him grooming this particular individual, much like he--like we would contend that he was grooming her sister. It fits the same pattern. Her coming to live with him as a father figure, much like [B.B.] came in to live with him as a father figure. And I believe that there's a direct correlation.

Id. at 189-90. The trial court sustained the objection. The State, however, then continued to question Crystal generally about her relationship with Cadena, before turning to the topic of B.B.

During its direct examination of Detective Lyle K. Bainter, the State elicited additional testimony regarding the history of Cadena's relationship with Crystal, as reported to Bainter during an interview with Cadena. Much of the same information came in, though it was more general than in Crystal's testimony. Defense counsel objected to only one of the statements by Bainter,⁶ and the objection was sustained.

In its closing argument, the State relied heavily on Cadena's history with Crystal, without any objection from defense counsel:

Crystal testified, and if you're like me, when you first saw Crystal, you probably thought that she was the victim, because she looks very young. She's 23, but she still looks like she's a kid. And we have to take a look at is this possible?

We have Mr. Cadena here, who's living out in the state of Oregon, lives next door to some folks who have a couple of girls living over there. He knows these girls. Girls having trouble. And you think at first blush, well, he's gonna do the right thing.... This kid, Crystal, needs...a helping hand. He's there to provide it. Come stay over here. We'll cut a deal with Child Services Program, the mother, foster parent.

...Well, you heard the evidence. He was her foster parent.... And so you have to take a mind set of what kind of a person could commit the acts that were committed against [B.B.] Could it be that someone who would

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⁶ Counsel objected to Bainter's testimony that there were times when Elizabeth would leave early for work and bring Crystal into their bedroom and have her lay with Cadena. Counsel objected, claiming that the statement "came out of nowhere" and was "totally inappropriate and inadmissible." *Id.* at 311.

ultimately seduce and impregnate and marry a foster child, would be capable of such an act?

You know, when you think about it, most of us here are parents, and if we have anybody here who wasn't a parent, we all were kids. And when you think of the concept of someone who can put their arms around someone in a fatherly fashion as a child, that could then go along to develop a romantic relationship with that same person in a short period of time, that tells you a lot about a person right there. Tells you a lot about a person right there in terms of what they're capable of.

Ladies and gentlemen, we have boundaries. We have boundaries, and that's why we have laws against child molestation and sexual misconduct with a minor, because we respect those boundaries. And when someone puts themselves out to be a parent, you can't just turn that off like a spigot unless you are already predisposed to have a problem, and it is a problem. You could see the manipulation in Mr. Cadena by what he did with his wife. She is his child, he then brings her in. She testified that she was needy. She needed somebody to care for her, to love her, and he gave her that. And she therefore wanted to do whatever she could to retain that, because she didn't have any more. He ends up divorcing his wife and marrying Crystal.

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Id. at 341-43 (emphases supplied).

Defense counsel briefly responded to the State's argument in this regard by stating, during closing argument, that Cadena's relationship with Crystal was not illegal and was irrelevant to the charges at hand. Counsel stated:

The State would like to emphasize that because they want you folks to think that well, because Mr. Cadena did something that we wouldn't approve of, maybe, albeit legal, we want you to think that he's a bad guy, and therefore he did these other things we're accusing him of. But I know you folks are smarter than that, and you know that's pretty irrelevant to why we're here today.

Id. at 349. In rebuttal, the State argued to the jury:

The reason that it makes sense to look at Mr. Cadena's history with Crystal is to understand what was going on with [B.B.] Because it shows a clear pattern of grooming this child for more. Young, impressionable child with

nowhere to turn, you get the hook in her, and she's yours. I think he did it with her sister, and I think he was doing it with [B.B.]

Id. at 354. Once again, defense counsel did not object to the State's propensity argument.

Indiana Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence, however, "may be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident". *Id.* "The rule is intended to prevent the jury from determining a defendant's present guilt upon his past propensities, the so-called 'forbidden inference." *Turney v. State*, 759 N.E.2d 671, 679 (Ind. Ct. App. 2001), *trans. denied*.

The State argues, for the first time on appeal, that Cadena failed to show an objection to the evidence and argument in question would have been sustained, because such evidence could have been admitted under the identity exception to Rule 404(b). This argument is disingenuous. Initially, we observe that in the rare instances that defense counsel did object to such evidence, the trial court sustained the objection. Moreover, the rationale underlying the identity exception is that "the modus operandi of the instant crime and the other bad acts are so similar and unique in nature that it is highly probable that the same person committed all of them." *Browning v. State*, 775 N.E.2d 1222, 1224 (Ind. Ct. App. 2002); *see also Wilhelmus v. State*, 824 N.E.2d 405 (Ind. Ct. App. 2005). In the instant case, identity was not an issue and, therefore, the identity exception would have been inapplicable.

There can be no doubt that the State used the evidence regarding Cadena's relationship and history with Crystal to establish that he was of bad character and had a propensity to sexually prey on needy girls, with whom he had first developed a fatherly relationship. As the State put it, he did it with Crystal and, therefore, he did it with B.B. This was not a proper consideration upon which to determine Cadena's guilt of the charged crimes.

Despite the improper use of this evidence, the State argues that counsel's failure to object to the majority of the bad character evidence offered at trial "may have been" strategy. Appellee's Brief at 8. We agree that strategic decisions generally do not support a claim of ineffective assistance. Hollins v. State, 790 N.E.2d 100 (Ind. Ct. App. 2003), trans. denied. There is no indication in the record, however, that it was counsel's strategy to allow extensive evidence of Cadena's arguably inappropriate relationship with Crystal into evidence. At the PCR hearing, trial counsel did not indicate that this was his strategy. On the contrary, counsel testified that he believed the history of Cadena's relationship with Crystal was irrelevant and prejudicial. Moreover, we fail to see how it would have been a reasonable trial strategy for defense counsel to allow evidence and argument regarding Cadena's relationship with Crystal, especially in light of the blatant propensity argument asserted by the State. Cf. id. at 109. ("[b]ased upon the lack of physical evidence placing Hollins inside..., it seems a reasonable trial strategy for counsel not to have focused on the potential accomplice liability of his client"). Defense counsel's failure to lodge timely objections to such evidence and argument was

unreasonable and deficient. *See Messer v. State*, 509 N.E.2d 249 (Ind. Ct. App. 1987), *trans. denied*.

With respect to prejudice resulting from counsel's performance, the State argues that Cadena has not shown the requisite prejudice because his convictions were supported by B.B.'s testimony. The State asserts: "B.B. was extremely credible and thus the admission of any improper evidence would not have had a substantial prejudicial effect on the jury." *Appellee's Brief* at 10. The trial court similarly found that the evidence "overwhelmingly demonstrated guilt". *Appellant's Appendix* at 70.

While the State certainly presented sufficient evidence of Cadena's guilt, we cannot agree that the evidence was overwhelming. *See Messer v. State*, 509 N.E.2d 249 (a verdict only weakly supported by the evidence is more likely to have been affected by errors than one with overwhelming evidentiary support). The sole evidence against Cadena, with respect to the sexual misconduct charges, was B.B.'s testimony. Although B.B. provided detailed descriptions of each sexual incident at trial, Cadena offered a legitimate defense that B.B. had fabricated these allegations because she was angry about the corporal punishment inflicted upon her the previous day, as well as the recent threat to send her to military school.⁷ The defense clearly established a motive to fabricate. In response, the State attempted to bolster its case by relying heavily upon Cadena's past relationship with Crystal and expressly encouraging the jury to draw the forbidden inference that "he did it with her sister," and now "he was doing it with [B.B.]" *Trial*

⁷ Cadena particularly noted the timing of the allegations, which were made soon after the corporal punishment and while B.B. was watching a television program with Crystal about sexual assault.

Transcript at 354. The State further argued to the jury that because Cadena previously seduced, impregnated, and married his foster child (that is, Crystal), he was the kind of person who could commit the sexual acts alleged by B.B.

Under the circumstances, the flood of improper evidence and argument presented to the jury regarding Cadena's prior bad acts made a fair trial on the sexual charges unlikely. See Rhodes v. State, 771 N.E.2d 1246 (Ind. Ct. App. 2002) (finding fundamental error where State flooded the courtroom with prejudicial details of prior misconduct and, during its case in chief, focused inquiry into the defendant's prior misconduct), trans. denied. Trial counsel's deficient performance prejudiced Cadena's defense to the extent that confidence in the outcome reached by the jury is undermined. See Smith v. State, 765 N.E.2d 578; Messer v. State, 509 N.E.2d 249. Cadena has established that he was denied effective assistance of counsel with respect to his convictions for child molesting and sexual misconduct with a minor. We, therefore, remand with instructions that the court grant Cadena's PCR petition and order a new trial on the charges of child molesting and sexual misconduct with a minor.

Judgment reversed and remanded.

BARNES, J., and MATHIAS, J., concur.

⁸ We note that counsel's deficient performance had no prejudicial effect on Cadena's conviction for battery. The State used the improper evidence to establish that Cadena sexually abused B.B., not that he battered her. Moreover, there was overwhelming evidence to support the battery conviction. In addition to B.B.'s testimony, the State presented pictures of the severe bruising and Detective Bainter testified that Cadena had admitted striking B.B. multiple times with a wooden board.